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In the Supreme Court of the United States

OCTOBER TERM, 1941

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PETER YOUNG, ALIAS YOUNG LUT, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH  
CIRCUIT

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MEMORANDUM FOR THE UNITED STATES

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**OPINION BELOW**

The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 334-344) is reported in 119 F. (2d) 399.

**JURISDICTION**

The judgment of the Circuit Court of Appeals was entered March 17, 1941 (R. 345). A petition for rehearing was denied April 14, 1941 (R. 346). The petition for a writ of certiorari was filed May 15, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Whether under Section 6 of the Harrison Anti-Narcotic Act it is an offense for a physician to fail to keep a record of limited-content narcotics dispensed by him.

## STATUTE INVOLVED

Section 6 of the Harrison Anti-Narcotic Act, as amended, c. 18, 40 Stat. 1132 (26 U. S. C., Supp. V, § 2551 (a) and (b)), reads:

That the provisions of this Act shall not be construed to apply to the manufacture, sale, distribution, giving away, dispensing, or possession of preparations and remedies which do not contain more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine, or any salt or derivative of any of them in one fluid ounce, or, if a solid or semi-solid preparation, in one avoirdupois ounce; or to liniments, ointments, or other preparations which are prepared for external use only, except liniments, ointments, and other preparations which contain cocaine or any of its salts or alpha or beta eucaine or any of their salts or any synthetic substitute for them: *Provided*, That such remedies and preparations are manufactured, sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this Act: *Provided further*, That any manufac-

turer, producer, compounder, or vendor (including dispensing physicians) of the preparations and remedies mentioned in this section lawfully entitled to manufacture, produce, compound, or vend such preparations and remedies, shall keep a record of all sales, exchanges, or gifts of such preparations and remedies in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall direct. Such record shall be preserved for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officers named in section 5 of this Act, and every such person so possessing or disposing of such preparations and remedies shall register as required in section 1 of this Act and, if he is not paying a tax under this Act, he shall pay a special tax of \$1 for each year, or fractional part thereof, in which he is engaged in such occupation, to the collector of internal revenue of the district in which he carries on such occupation as provided in this Act. The provisions of this Act as amended shall not apply to decocainized coca leaves or preparations made therefrom, or to other preparations of coca leaves which do not contain cocaine.<sup>1</sup>

<sup>1</sup> Section 9 of the Harrison Anti-Narcotic Act (26 U. S. C., Supp. V, § 2557 (b) (1)), provides "That any person who

## STATEMENT

Petitioner was convicted in the United States District Court for the Territory of Hawaii on all but the first two counts of an indictment in ten counts (R. 4-17, 26).<sup>2</sup> The third count charged in substance that petitioner, a physician duly registered under the Harrison Act and entitled to sell and dispense, in the course of his professional practice, preparations containing not more than two grains of opium per fluid ounce, provided that he keeps certain prescribed records, sold such a preparation, to-wit: paregonic, and "did knowingly, willfully, unlawfully, and feloniously fail to keep" the prescribed records. The remaining counts upon which petitioner was convicted were similar to Count III, except that each involved a different limited-content narcotic preparation. Petitioner was sentenced to two years imprisonment and to pay a fine of \$2,000 on Count III. The sentence of imprisonment on this count and imposition of sentences on Counts IV to X, inclusive, were suspended and petitioner was placed on probation for five years (R. 54-55, 323-324).

The material facts are undisputed. Petitioner

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violates or fails to comply with any of the requirements of this act shall, upon conviction, be fined not more than \$2,000 or be imprisoned not more than five years, or both, in the discretion of the court."

<sup>2</sup> The first two counts were dismissed on motion of the Government (R. 21, 220).



concedes that he sold and dispensed exempt preparations in the quantities charged in the indictment, and that he did not keep the records prescribed under the second proviso of Section 6 (Pet. 11-12). His contention is that this proviso is not an independent requirement, but sets forth only a condition precedent to the exemption created by Section 6. In his view, the failure to keep the prescribed records merely deprived him of the benefit of this exemption and placed him under the obligation to comply with the other requirements of the Harrison Act relating to taxable narcotics. He points out, further, that under Section 2 (a) (Appendix, *infra*, p. 10), he could have dispensed full-strength narcotics without keeping records, when acting in the course of his professional practice and in personal attendance upon patients, as he claimed to be acting in the instant case (Pet. 17-19, 31-32).

The trial court and the Circuit Court of Appeals took the view that the second proviso of Section 6 constituted an unconditional requirement that all vendors of exempt preparations keep records (R. 40, 117, 245, 308-309, 341-342).

#### DISCUSSION

It is true, as the Circuit Court of Appeals pointed out (R. 341), that the language of the proviso is mandatory. But this is not necessarily decisive as to the relation of the proviso to the

statute as a whole. When Section 6 is read in its entirety, and with the remainder of the Act,<sup>3</sup> we think there is much to support petitioner's view that the proviso is simply one of the conditions precedent to the dispensation of limited-content narcotics as preparations exempt from the other provisions of the Act. Cf. *United States v. Leach*, 291 Fed. 788 (E. D. Mich.). The requirement of records is in form a proviso limiting the exemption contained in the principal clause. It is found in a section creating a broad exemption from the other provisions of the Act. Section 2 (a) of the Act, dealing with true narcotics, shows a legislative intent to relieve physicians from the burden of keeping records when they are acting in the course of their professional practice. Nor is there anything in the legislative history of the Act which precludes petitioner's construction.<sup>4</sup>

Furthermore, the Bureau of Narcotics, in the administration of the Harrison Act, has uniformly construed the proviso as a condition precedent to exemption. This construction was first adopted in Article 141 of Regulations No. 35 of the Bureau of Internal Revenue published in 1919, immediately after the addition of the proviso to Section

<sup>3</sup> Cf. *Costanzo v. Tillinghast*, 287 U. S. 341, 345; *Anderson v. Pacific Coast S. S. Co.*, 225 U. S. 187, 203; *White v. United States*, 191 U. S. 545, 551.

<sup>4</sup> See Annual Report of Treasury Department for 1915, pp. 23-24, and House Rept. No. 767, 65th Cong., 2d Sess., p. 36; House Rept. No. 1037, 65th Cong., 3d Sess., pp. 87-88.



6. Article 180 of the current Treasury Regulations No. 5 (26 C. F. R. 151.180) likewise declares that Section 6 "has the effect of conditionally exempting from liability under the other sections of the Act" those manufacturing and dealing in exempt preparations. The Bureau has consistently advised United States Attorneys that Section 6 is not a penal provision, and no reference to this section is contained in the Citator of Violations, a confidential manual of offenses furnished by the Bureau to all narcotic agents. Such contemporaneous and long-standing administrative construction of the statute is, of course, entitled to great weight. See *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 315; *United States v. American Trucking Associations*, 310 U. S. 534, 549; cf. *United States v. Falk and Bro.*, 204 U. S. 143.<sup>5</sup> During the twenty years since its enactment no other prosecutions have been brought for violation of Section 6 and the Bureau of Narcotics learned of this charge against petitioner only after the judgment of conviction had been entered.

<sup>5</sup> The Circuit Court of Appeals relied in part upon 26 U. S. C. § 2553 (a), which requires that all persons liable to any tax imposed by the Act shall keep records prescribed by the Secretary of the Treasury, and the provisions of Article 185 of Treasury Regulations No. 5 (26 C. F. R. 151.185), requiring, substantially in the language of Section 6, that records of dispensations of limited-content narcotics be kept (R. 341). However, in view of the administrative interpretation of Section 6 outlined above, which was not brought to the attention of the courts below, it cannot be

Further, doubt as to the applicability of the second proviso of Section 6 to physicians acting in the course of their professional practice arises from the language of the proviso itself. The words referring to the transactions of which a record must be made, viz, "sales, exchanges or gifts," would seem inept when so applied. Also, the words designating the persons subject to the obligation to keep records, viz, "any manufacturer, producer, compounder, or vendor (including dispensing physicians)," although susceptible of the construction that physicians are to be regarded as vendors of the drugs even when administering them to patients, may equally be said to describe dispensing physicians only when they vend drugs to others than their patients.

In view of the doubt as to the scope and operation of the second proviso in Section 6, the case is believed to be one for the application of the principle that ambiguity in a penal statute must be resolved in favor of the accused. *United States v. Resntek*, 299 U. S. 207, 209-210; *United States v. Scharton*, 285 U. S. 518, 521-522.

#### CONCLUSION

For the reasons stated, the Government consents to the granting of the petition for a writ of certiorari. It is supposed that Article 185 was intended to be an independent exercise of rule-making power pursuant to Section 2555 (a) or the general rule-making provisions of 26 U. S. C. § 2559 (a). It would seem to have no greater force than Section 6 itself.

tiorari, the reversal of the judgments below, and the remanding of the case to the District Court with direction to dismiss the third count of the indictment.\*

Respectfully submitted,

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\* Since sentence was imposed and, therefore, judgment was entered only as to the third count (see *supra*, p. 4), that count technically is the sole one before this Court. See *Berman v. United States*, 302 U. S. 211, 212. Upon remand the Government will, of course, request the District Judge to dismiss the remaining counts and terminate probationary supervision.

## APPENDIX

Section 2 of the Harrison Anti-Narcotic Act, c. 1, 38 Stat. 786 (26 U. S. C., Supp. V, Section 2554), provides, so far as pertinent:

SEC. 2. That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. \* \* \* Nothing contained in this section shall apply—

(a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only: *Provided*, That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in this Act.